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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 265

IN THE MATTER OF THE APPLICATION OF
BARBARA F. BERLIN,

Respondent,

For the Custody of JONATHAN BERLIN and
RICHARD BERLIN,

—against—

JOSEPH G. BERLIN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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TABLE OF CONTENTS

	PAGE
The Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions and Statutes Involved	3
Statement	4
Reasons For Granting The Writ	8
CONCLUSION	14

CASES CITED

Ansorge v. *Armour,* 267 N. Y. 492 (1935)	9
Bray v. *Bray,* 225 Md. 476 (1961)	13
Brown v. *Stevens,* 331 F.2d 803 (1964)	13
Burns v. *Bines,* 189 Md. 157 (1947)	13
Butler v. *Perry,* 210 Md. 332 (1955)	8
Cornwell v. *Cornwell,* 244 Md. 674 (1966)	8
Durfee v. *Duke,* 375 U.S. 106 (1963)	8
Esenwein v. *Pennsylvania,* 325 U.S. 279 (1944	14
Ferster v. *Ferster,* 237 Md. 548 (1965)	12
Ford v. *Ford,* 371 U.S. 187 (1962)	8
Glick v. *Glick,* 232 Md. 244 (1963)	12
Griggs v. *Griggs,* 228 Md. 539 (1962)	13
Hild v. *Hild,* 221 Md. 349 (1960)	13
Johnson v. *Muelberger,* 340 U.S. 581 (1950)	8

PAGE

Kovacs v. Brewer, 356 U.S. 604 (1958) 8

Mason v. *Mason*, 228 Md. 387 (1962) 13

Matter of Metz v. *Morley*, 29 A. D. 2d 462 (4th Dep't, 1968) 9

May v. *Anderson*, 345 U.S. 528 (1953) 8

Miller v. *Schneider*, 170 S.W. 2d 301 (Tex. Civ. App., 1943) 13

Naylor v. *Naylor*, 217 Md. 615 (1958) 8

New York ex rel. Halvey v. *Halvey*, 330 U.S. 610 (1947) 8

People ex rel. Koelsch, 3 Ill. 2d 483 (1954) 11

People ex rel. Tull v. *Tull*, 270 N. Y. 619 (1936) 9

Pitts v. *Pitts*, 181 Md. 182 (1942) 8

Sampsell v. *Superior Court*, 32 Cal. 2d 763 (1948)..... 13

Sharpe v. *Sharpe*, 77 Ill. App. 8d 295 (1966)..... 13

Sherrer v. *Sherrer*, 334 U.S. 343 (1947)..... 8

Tull v. *Tull*, 122 Md. 213 (1937) 8

Wallis v. *Wallis*, 235 Md. 33 (1964) 12

Winter v. *Crowley*, 231 Md. 323 (1962) 8

Yarborough v. *Yarborough*, 290 U.S. 202 (1933..... 14

STATUTES CITED

U. S. Constitution, Art. IV, Sec. 1 3

28 U.S.C. § 1737 3

TREATIES AND ARTICLES CITED

Comment, The Puzzle of Jurisdiction in Child Custody Actions, 38 U. Col. L. Rev. 541 (1966) 10, 11, 12

Currie, Full Faith and Credit, Chiefly To Judgments: A Role for Congress, 1964..... 9

PAGE

Ehrenzweig on Conflict of Laws §§ 87-89 (1962) 11

Ehrenzweig, Interstate Resolution of Custody Decrees, 51 Mich. L. Rev. 345, 352 (1953) 10

Full Faith and Credit to Child Custody Decrees? 73 Yale L. J. 134 (1963) 11

Jackson, Full Faith and Credit—The Lawyer's Clause of the Constitution, 45 Col. L. Rev. 114 (1945) 13

Note 53 Ky. L. J. 799 (1965) 10

Note, U. Pa. L. Rev. 970, 973 (1933) 11

Note, *Jurisdiction in Custody Cases—Full Faith and Credit,* 53 Ky. L. J. 799, 805-806 (1965) 11

13 Vill. L. Rev. 406 (1968) 10

Ratner, Child Custody in a Federal System, 62 Mich. L. Rev. 795 (1964) 10

Ratner, Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Curry and a Proposed Uniform Act, 38 So. Cal. L. Rev. 183 (1965) 11

Rodgers, Due Process—Full Faith and Credit, 67 Cal. L. Rev. 1363 (1967) 9

Stansbury, Custody and Maintenance Law Across State Lines, 10 Law and Contemporary Problems, 819 (1943) 10, 14

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—against—

JOSEPH G. BERLIN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

The Petitioner, Joseph G. Berlin, prays that a Writ of Certiorari issue to review (a) an order of the New York Court of Appeals, dated December 29, 1967, as amended, which modified an order of the Supreme Court of the State of New York, Appellate Division, Second Department, made on July 10, 1967; and (b) an order of the New York Court of Appeals made on April 10, 1968, to the extent that it denied a rehearing of the aforesaid appeal to that Court.

The Opinions Below

The opinion of the Court of Appeals of the State of New York is reported at 21 N.Y.2d 371, 288 N.Y.S.2d 44 and 235 N.E. 2d 109. That opinion and the order and

remittitur as amended, are printed in the Appendix at pages 1a to 9a.

The decision of the New York Court of Appeals denying rehearing, denying clarification of its opinion, and granting amendment of its remittitur, is printed in the Appendix at pages 10a and 11a.

The memorandum decision of the Supreme Court, Appellate Division, Second Department, modifying the decision and judgment of the Supreme Court of the State of New York, County of Queens, is reported at 28 A.D.2d 877, and 281 N.Y.S.2d 663, and its decision and order are printed in the Appendix at pages 12a to 19a.

The opinion of the Supreme Court of the State of New York, County of Queens, has not been officially or unofficially reported. Its opinion is printed in the Appendix at page 20a. The interim order and final judgment of that court are printed in the Appendix at pages 21a to 24a.

Jurisdiction

The order of the New York Court of Appeals was entered on December 29, 1967. On March 26, 1968 this Petitioner moved in the Court of Appeals for rehearing, clarification of its opinion, and amendment of the remittitur. On April 10, 1968 the New York Court of Appeals entered an order denying rehearing, denying clarification of its opinion, and granting amendment of the remittitur.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257.

Questions Presented

1. Does the order of the New York Court of Appeals affirming the award of custody of the parties' two sons to the Respondent, directly contrary to a modified final decree

of divorce of the State of Maryland which awarded custody to the Petitioner, contravene Article IV, Section 1 of the Constitution of the United States under the circumstances of this case, including in particular (a) the Respondent's unsuccessful challenge in Maryland to the jurisdiction of that state to modify the divorce decree, (b) the absence of changed circumstances since the Maryland award, and (c) the Respondent's repeated contempts of the Maryland courts.

2. Does the order of the New York Court of Appeals affirming a direction that the Petitioner pay for the support of his sons, contrary to the modified Maryland decree rescinding the Petitioner's support obligations, contravene Article IV, Section 1 of the United States Constitution in the circumstances of this case, including in particular (a) the Respondent's repeated contempts of the Courts of the State of Maryland, (b) the absence of changed circumstances since the modification of the Maryland decree and (c) the absence of any showing of need for such payments which could support a legitimate overriding public interest in the State of New York prompted by the welfare of these boys.

Constitutional Provisions and Statutes Involved

The questions presented require the interpretation and application of Article IV, Section 1 of the Constitution of the United States, which provides:

> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Likewise involved is 28 U.S.C. § 1737 which in pertinent part provides: "Such Acts, records and judicial proceed-

ings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. 62 Stat. 243 (1948).

Statement

This case by no means involves the usual proceeding to determine custody based on changed circumstances. As readily appears, the Respondent instituted and prosecuted this proceeding in New York solely to thwart a determination in Maryland that the award of custody to this Petitioner would be in the best interests of his sons.

The parties lived in Maryland subsequent to their marriage in 1954 and prior to their divorce in that State upon the petition of the Respondent, in September, 1960 (22, 92).* The divorce decree (92), which incorporated an agreement of the parties (94), awarded custody to the Respondent. The boys are now 14 and 15½ years of age (22). The decree awarded the Respondent a lump sum and other considerations in full settlement of her own property rights and future support, and in addition provided for monthly payments for the support of the children "subject to further order of this Court".

About six months after the divorce, the Respondent removed the children to New York contrary to the decree as subsequently held by the Maryland courts (107, 117). Thereafter, the Respondent promptly and repeatedly deprived the Petitioner of his visitation rights. As a result, she was several times adjudicated in contempt of the Maryland courts. Those adjudications are set forth and summarized in the several orders and opinions rendered by those courts (107, 109, 113).

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* Unless otherwise indicated, numerical references are to pages of the Record On Appeal in the New York Court of Appeals.

The last such adjudication was made by the Montgomery County Circuit Court in August, 1963, after the Respondent wilfully refused to appear in Maryland although personally served with process in New York. Prior to that adjudication, this Petitioner also applied to the Court for a change in custody. The Respondent likewise ignored notice of that proceeding and refused to appear. As a result, the order adjudicating her in contempt also directed the Montgomery County Circuit Court Probation Department to investigate into the circumstances surrounding this Petitioner's request for a change in custody (109).

Although a change in custody had not yet been ordered, the Respondent instituted the within proceeding in New York in September, 1963 after she learned of this Petitioner's application for custody. As appears from her petition in New York, this proceeding was brought solely for the purpose of enjoining the removal of the children from New York State (11-13). On October 29, 1963, upon the basis of its Probation Department's investigation and report, the Montgomery County Circuit Court made an order modifying the original divorce decree (1) by awarding custody to this Petitioner, finding that such award was in the "best interests and welfare of said children", and (2) by rescinding the provisions of the decree relative to the support of the children, subject to the further order of the Court (110). The same day this Petitioner went to New York to obtain the physical custody of his sons, but he was prevented first by the Respondent and her present husband (57-59), and the next day by an *ex parte* order obtained by the Respondent's attorneys (121).

The Respondent did not pursue her New York proceeding which was then scheduled for a hearing the following day (121), but instead elected to challenge the jurisdiction and decision of the Maryland courts by direct application to the Montgomery County Circuit Court. On November 27, 1963 she made her application to vacate the order of Octo-

ber 29, 1963, and her application was denied in a lengthy opinion by the Montgomery County Circuit Court on May 26, 1964 (113-117). She pressed her attack to the Court of Appeals of the State of Maryland which, on May 26, 1965, rejected her contentions that the Montgomery County Circuit Court lacked jurisdiction to award custody to this Petitioner (107). In its lengthy opinion, the Maryland Court of Appeals also considered and rejected the Respondent's contention on the merits that the change in custody was erroneous in the circumstances of this case. That Court found, among other things, that this Petitioner was a "fit and proper person to have custody of the children", and in a display of abundant fairness to the Respondent noted she would not be foreclosed from seeking visitation rights or, at an appropriate time, reapplying for custody. The Respondent did not seek or obtain further review by this court.

The Respondent immediately revived her dormant New York proceeding by bringing it on for trial less than a month after her defeat in Maryland. Her New York petition was not amended so as to allege any purported change in circumstances since the Maryland modification, or in any other respect. Neither did it request an award for child support. The trial was brief, and was marked from the outset by the trial judge's attempts to persuade this Petitioner to waive his claim to custody in favor of the Respondent—a New York resident (34-37, 75-76). The Respondent's proof related almost exclusively to the irrelevant difficulties between these parties prior to the modification of the Maryland decree. This Petitioner's proof was mostly appropriate rebuttal. It was also established that the Respondent lived in an apartment in Forest Hills, Queens County, with her sons and her second husband whom she married on June 20, 1963 (prior to the Maryland custody change) (22-24, 44); that she had been seeing a psychiatrist (25); and that her second husband was employed in a managerial capacity and was supporting the two children (48, 51). This Petitioner, on the other hand,

established his remarriage (62), and showed generally that he lived in comfortable circumstances with ample room and a strong desire for his sons (54, 64).

The trial judge did not consult the children, and no other investigation was made concerning their circumstances or welfare. No proof was adduced tending to show that the children would be adversely affected by compliance with the Maryland decree. No showing was made that this Petitioner is unfit to have custody, and indeed his fitness has been affirmatively found by all the courts in Maryland and New York. And although all the New York courts below wrote opinions, none was able to point to a single fact occurring subsequent to the Maryland modification which could reasonably be characterized as a change in circumstances. The New York Court of Appeals merely noted the Respondent's continuous custody, a fact forcefully brought home to the Maryland courts, and then *presumed* that the boys have adjusted and that adherence to the Maryland decree *"could* have a disruptive effect" upon them. The New York Court of Appeals manifestly disagreed with the Maryland courts, on the basis of the same facts.

The federal questions sought to be reviewed here were raised by this Petitioner, as follows: (a) In the court of first instance, by the affirmative defense alleged in this Petitioner's verified answer (14-15), and by motions to dismiss the petition during the course of trial (74-75, 89). The trial court reserved decision when the motion was first made (75), but denied the motion when it was made the second time (89). (b) In the Supreme Court, Appellate Division, Second Department, by contending that the award of custody and support to the Respondent contravened Article IV, Section 1 of the Constitution of the United States. That Court, as shown by its memorandum decision (Appendix, pages 12a-18a), rejected the Petitioner's contentions. (c) In the New York Court of Appeals, by contending that the award of custody and support to the Respond-

ent contravened Article IV, Section 1 of the Constitution of the United States. As shown by the Court's opinion and its remittitur, as amended (Appendix, pages 1a-11a), that Court rejected the Petitioner's contentions.

Reasons For Granting The Writ

In the past this Court has found it unnecessary to decide this question of crucial national importance, namely, whether and to what extent one state is bound to give full faith and credit to the custody decree of a sister state rendered with jurisdiction, in the absence of changed circumstances affecting the welfare of the child. *New York ex rel. Halvey* v. *Halvey,* 330 U.S. 610 (1947); *May* v. *Anderson,* 345 U.S. 528 (1953); *Kovacs* v. *Brewer,* 356 U.S. 604 (1958); *Ford* v. *Ford,* 371 U.S. 187 (1962). That question is squarely presented here.

The jurisdiction of Maryland to modify its decree by awarding custody to the petitioner is beyond challenge. *Sherrer* v. *Sherrer,* 334 U.S. 343 (1947); see, also, *Durfee* v. *Duke,* 375 U.S. 106 (1963); *Johnson* v. *Muelberger,* 340 U.S. 581 (1950). Nor is there any question concerning the effect which a Maryland court would give to that modification; the Maryland Court of Appeals specifically refused to disturb it, and it is established Maryland law that a custody award is *res judicata* upon the facts presented and will not be disturbed in the absence of a factual showing of changed circumstances which require a different disposition for the welfare of the child. *Cornwell* v. *Cornwell,* 244 Md. 674, 680 (1966); *Winter* v. *Crowley,* 231 Md. 323, 331 (1962); *Naylor* v. *Naylor,* 217 Md. 615, 631 (1958); *Butler* v. *Perry,* 210 Md. 332, 342 (1955); *Pitts* v. *Pitts,* 181 Md. 182, 193 (1942); *Tull* v. *Tull,* 122 Md. 213. 218 (1937). Clearly, there is no such showing of changed circumstances in this record. Even if the New York Court of Appeals had so implied, this Court would not be bound inasmuch as there is no evidentiary basis.

Williams v. *North Carolina,* 325 U.S. 226, 236-(1944); see, also, *Whitus* v. *Georgia,* 385 U.S. 545, 550 (1967); *Ker* v. *California,* 374 U.S. 23, 34 (1963); *Norris* v. *Alabama,* 294 U.S. 587, 589-590 (1934).

Partially as a result of an erroneous reading of this Court's opinion in *May* v. *Anderson, supra,* the Court of Appeals unnecessarily but flatly stated in *Bachman* v. *Mejias,* 1 N. Y. 2d 575, 580 (1956) that "The full faith and credit clause does not apply to custody decrees". That holding marked the Court's departure from prior New York law that a custody decree of a sister state, made with jurisdiction, is entitled to full faith and credit unless "circumstances have so changed that the welfare of the child demands a shift of custody". *Ansorge* v. *Armour,* 267 N. Y. 492, 501 (1935). What was forceful dictum in *Bachman* v. *Mejias, supra,* became a necessary holding on the facts of the instant case. Particular significance may be attached to the fact that in 1936 the New York Court of Appeals squarely held that a Maryland custody decree was entitled to full faith and credit in New York in the absence of changed circumstances. *People ex rel. Tull* v. *Tull,* 270 N. Y. 619 (1936). But the Court of Appeals has now said in this case that a custody decree made in Maryland, or for that matter anywhere else, is now entitled only to discretionary recognition which, in the words of the Court, does not preclude "relitigating the issue" (Appendix, page 5a). This rule has more recently been acknowledged in *Matter of Metz* v. *Morley,* 29 A. D. 2d 462 (4th Dep't, 1968), and is understood to be the New York rule by legal commentators. Rodgers, *Due Process—Full Faith and Credit,* 67 CAL. L. REV. 1363, 1369, fn. 43 (1967); Currie, *Full Faith and Credit, Chiefly To Judgments: A Role for Congress,* 1964 The Supreme Court Review 89, 115; 13 VILL. L. REV. 406, 410 (1968). In *Kovacs* v. *Brewer, supra* at page 608, this Court observed New York's drift in this direction.

It is the Petitioner's position that there is no basis in the precedents of this Court, or in the history and purpose of the Full Faith and Credit clause, or in any national policy

for holding that one state may deprive the valid custody decree of a sister state of the effect it would receive in the rendering state, absent changed circumstances—particularly upon the application of one who has shown flagrant disrespect for the lawful mandates of the sister state. The instability and insecurity generated by the policy of discretionary recognition of such decrees can only be harmful to children and their parents, and such a policy can only foster disrespect for the Courts. A clear national policy of appropriate adherence to valid decrees would do no more than prevent supervision by one sovereign over another and the provincialism which so often lays claim to a superiority of wisdom.

This case is, of course, of paramount importance to the Petitioner. But it is believed that its larger importance lies in its capacity for contributing to the clarification nationally of a recurrent and vexing question for which there is the clearest need.

Prior to this Court's decisions in *Halvey, Anderson, Brewer* and *Ford, supra,* there appeared to be near unanimity among the various jurisdictions that the Full Faith and Credit clause applies to valid custody decrees, absent a factual demonstration of a change in circumstances requiring a custody change. Stansbury, *Custody and Maintenance Law Across State Lines,* 10 LAW AND CONTEMPORARY PROBLEMS, 819, 828 (1943). Since those decisions, interpreted by some as suggesting the inapplicability of the clause, the courts of various states in increasing numbers have adopted the view that it is constitutionally permissible to relitigate the custody question already disposed of by a sister state, on the theory that the child's welfare as evaluated by the second reviewing state should govern. Ratner, *Child Custody in a Federal System,* 62 MICH. L. REV. 795, 815 (1964); Ehrenzweig, *Interstate Recognition of Custody Decrees,* 51 MICH. L. REV. 345, 352-355 (1953); Comment, *The Puzzle of Jurisdiction in Child Custody Actions,* 38 U. COL. L. REV. 541, 543 (1966); Note 53 KY. L. J. 799, 804 (1965); 13 VILL L. REV. 406, 409 (1968). The cited works and authors also point up that many state courts do apply

the Full Faith and Credit clause in the absence of changed circumstances. But of the courts who do, some merely use the phrase as an excuse for avoiding the effect of the foreign decrees in order to serve the resident of the forum. *The Puzzle of Jurisdiction in Child Custody Actions, supra,* at pages 547-548 and fn. 37; Ehrenzweig, *Interstate Resolution of Custody Decrees, supra,* at page 352. And some courts candidly confess there is doubt as to the extent of the protection afforded by the Full Faith and Credit clause. See, *e.g., Butler* v. *Perry,* 210 Md. 332, 342 (1955) (referring to *New York ex rel. Halvey* v. *Halvey* and *May* v. *Anderson, supra*). On facts strikingly similar but less compelling than those in this case, the highest court of Illinois has given full faith and credit to a modification of a custody decree by a Massachusetts court. *People ex rel. Koelsch,* 3 Ill. 2d 483 (1954).

The national disarray with regard to the question under discussion is evident from a reading of the commentators hereinabove referred to, and others as well. See also *Ford v. Ford; Full Faith and Credit to Child Custody Decrees?* 73 YALE L. J. 134 (1963); EHRENZWEIG ON CONFLICT OF LAWS, §§ 87-89 (1962). The New York rule of discretionary recognition, adopted much earlier in Kansas and known as the "Kansas Rule", has been severely criticized by some and endorsed by others. *Compare* Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Curry and a Proposed Uniform Act,* 38 So. CAL. L. REV. 183, 188 (1965) and Note, 81 U. Pa. L. REV. 970, 973 (1933), *with* Note, *Jurisdiction in Custody Cases—Full Faith and Credit,* 53 KY. L. J. 799, 805-806 (1965). Those urging the applicability of the Full Faith and Credit clause stress its partiular relevance to custody litigation, anticipating such beneficial results as the enhancement of the dignity of courts, the better likelihood of the appearance of both parents thereby assuring fuller review of the facts, and a reduction in litigation. Ratner, *Legislative Resolution of the Interstate Child Custody Problem: A Reply to Professor Curry and a Proposed Uniform Act, supra,* at pages 191-192; see also *The Puzzle of Jurisdiction*

in Child Custody Actions, supra. While there is disagreement as to whether the rampant confusion should be resolved by this Court, or by Congress, or by uniform act adopted by the several states, there is accord on the proposition that something should and must be done to settle the question which this Petitioner asks this Court to review.

This case is one step—perhaps even several—beyond the usual situation. For here the Respondent repeatedly and maliciously violated the orders and mandates of the Maryland Courts, and invoked the jurisdiction of the Courts of New York solely for the purpose of annulling the decree of a sister state. Although there is considerable diversity of view among the several states as to the applicability of the Full Faith and Credit clause in the absence of contumacious conduct, it is clearly the prevailing view that in such circumstances courts will not add to the insult by their interference but will instead remand the party petitioning for change to the original forum. EHRENZWEIG, *op. cit. supra,* at pages 293-297; Ehrenzweig, *Interstate Recognition of Custody Decrees, supra,* at pages 363-369.

The award of custody to the Petitioner by the Montgomery County Circuit Court was made more than two months after the adjudication of the Respondent's last contempt of that Court, was predicated upon its Probation Department's investigation conducted in the meanwhile, and was specifically sustained by the Maryland Court of Appeals. Nothing has happened since of consequence that was not before that Court, although the Respondent had ample opportunity to make such showing. The denial of Full Faith and Credit here was a flagrant repudiation of the integrity and judgment of the Maryland courts which, by a long line of cases, are governed by the nationally accepted criterion that the best interests of the child control in these matters. *Ferster v. Ferster,* 237 Md. 548, 550-551 (1965); *Wallis v. Wallis,* 235 Md. 33, 36 (1964); *Glick v. Glick,* 232 Md. 244, 248 (1963); *Mason v. Mason,* 228 Md. 387,

389 (1962); *Griggs v. Griggs,* 228 Md. 539, 541 (1962); *Bray v. Bray,* 225 Md. 476, 481 (1961); *Hild v. Hild,* 221 Md. 349, 351 (1960); *Burns v. Bines,* 189 Md. 157, 162-163 (1947). There is no reason why the courts of New York should not be able to assume, with confidence, that the courts of a sister state will act with wisdom and sincerity in all matters pertaining to the welfare of children. *Sampsell v. Superior Court,* 32 Cal. 2d 763, 779 (1948); *Miller v. Schneider,* 170 S.W.2d 301, 303 (Tex. Civ. App., 1943). The Montgomery County Circuit Court is no exception to the rule, as was specifically held in *Brown v. Stevens;* 331 F.2d 803, 805 (1964).

The "tug of war" between sister states in cases such as this has been aptly described as a "grotesquery". *Sharpe v. Sharpe,* 77 Ill. App. 2d 295 (1966). The Court in that case said: "To paraphrase Mr. Justice Jackson's statement in Estin v. Estin, 334 U.S. 541, if there is one thing the people are entitled to expect from their lawmakers, it is rules of law that will enable children, or those acting for them, to tell to whom they belong, and if they don't know, where they can find out." (at page 297). Justice Jackson once said: "The whole issue of faith and credit as applied to the law of domestic relations is difficult, and the books of the Court will not be closed on it for a long time, if ever." Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution,* 45 COL. L. REV. 114 (1945). This Court will obviously not close its books if it reviews this case, but at least it might turn one very important page.

With regard to the allowance by New York of support for the children contrary to the modified Maryland decree, a reversal by this Court on the custody issue should the writ issue would also require the reversal of the award of support. Beyond that, however, the award of support was unconstitutional for separate and additional reasons. Sup-

port was withdrawn by the Montgomery County Circuit Court solely because of the Respondent's contempts, and this Petitioner's rights are now fixed by the modified final divorce decree. Whatever the future may hold, it seems clear that the modified decree is unalterable, or should be, by the action of any Court other than the Montgomery County Circuit Court. The Respondent can hardly purge herself anywhere else. Nor can the State of New York lay claim to any overriding domestic public policy consideration arising out of an obligation to secure the health and welfare of its resident minors. There is not the slightest showing of necessity for support by this Petitioner. Accordingly, it is respectfully submitted that New York's award of support was unconstitutional and should be reversed. *Yarborough v. Yarborough,* 290 U.S. 202 (1933); See also, *Johnson v. Muelberger, supra; Esenwein v. Pennsylvania,* 325 U.S. 279 (1944); Stansbury, *Custody and Maintenance. Law Across State Lines, supra,* at page 832.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

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